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Global Crossing

February 17, 2000

BY OVERNIGHT MAIL

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: CC Docket No. 99-333

Dear Ms. Salas:

Enclosed for filing please find an original plus four (4) paper copies and one (1) diskette copy of the Comments of Global Crossing Telecommunications, Inc. in the above-docketed proceeding.

To acknowledge receipt, please affix an appropriate notation to the copy of this letter provided herewith for that purpose and return same to the undersigned in the enclosed, self-addressed envelope.

Very truly yours,

Michael J. Shortley, III

cc: International Transcription Service
Ms. Lauren Kravetz, Wireless Telecommunications Bureau
Mr. Christopher Libertelli, Common Carrier Bureau
Mr. Matthew Vitale, International Bureau
Mr. Jim Bird, Office of General Counsel

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Joint Applications for Consent	)	
To Transfer of Control Filed	)	**CC Docket No. 99-333**
by MCI WorldCom, Inc. and Sprint	)	
Corporation	)	

COMMENTS OF GLOBAL CROSSING TELECOMMUNICATIONS, INC.

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February 17, 2000

Table of Contents

Summary

Global Crossing does not oppose the merger of MCI and Sprint *per se*. However, the proposed merger of MCI and Sprint raises serious competitive concerns with respect to the Internet backbone market. The prior merger of MCI and WorldCom itself raised sufficient concern that the European Commission conditioned its approval of that merger on the divestiture of MCI's Internet business, and the United States Department of Justice and this Commission relied upon the EC decision in approving that merger. Despite that divestiture, MCI, through its UUNet subsidiary, still controls approximately fifty percent of the Internet backbone business. The EC identified Sprint as one of the "big four" Internet backbone providers. The combination of MCI's and Sprint's Internet backbone business would raise concentration levels to unacceptably high levels by any traditional measure.

In addition, because of the nature of the Internet backbone business, the proposed merger would provide the combined entity with unique opportunities unfairly to discriminate against competing Internet backbone networks. The combined entity would have far less incentive to enter into peering arrangements with competing backbone providers. Moreover, it would also be able to leverage its position to gain a competitive advantage in downstream markets. Finally, the market power that could be exercised by the combined entity is unlikely to be transitory or offset by rapid entry or expansion of competition.

Thus, the Commission should condition its approval of the merger on an effective divestiture of an economically meaningful portion of the combined entity's Internet backbone operations. However, for such a divestiture to be meaningful, two conditions must be met. *First*, the Commission must ensure that the divested entity possess the

resources necessary to operate as an effective, stand-alone entity. *Second*, the Commission should not permit the divested entity to be acquired by a significant existing Internet backbone provider such that the resulting entity could also exhibit anti-competitive characteristics.

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COMMENTS OF GLOBAL CROSSING TELECOMMUNICATIONS, INC.

Introduction

Global Crossing Telecommunications, Inc. ("Global Crossing"), pursuant to the Bureau's Public Notice,[1] submits these comments on the applications for consent to transfer of control submitted by MCI WorldCom, Inc. ("MCI") and Sprint Corporation ("Sprint").

Global Crossing does not oppose the merger of MCI and Sprint *per se*. However, the proposed merger of MCI and Sprint raises serious competitive concerns with respect to the Internet backbone market. The prior merger of MCI and WorldCom itself raised sufficient concern that the European Commission ("EC") conditioned its approval of that merger on the divestiture of MCI's Internet business, and the United States Department of Justice and this Commission relied upon the EC decision in approving that merger. Despite that divestiture, MCI, through its UUNet subsidiary, still

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1 Public Notice, CC Dkt. 99-333, *Commission Seeks Comment on Joint Applications for Consent To Transfer of Control Filed by MCI WorldCom, Inc. and Sprint Corporation*, DA 00-104 (Jan. 19, 2000) ("Public Notice").

controls approximately fifty percent of the Internet backbone business. The EC identified Sprint as one of the "big four" Internet backbone providers. The combination of MCI's and Sprint's Internet backbone business would raise concentration levels to unacceptably high levels by any traditional measure.

In addition, because of the nature of the Internet backbone business, the proposed merger would provide the combined entity with unique opportunities unfairly to discriminate against competing Internet backbone networks. The combined entity would have far less incentive to enter into peering arrangements with competing backbone providers. Moreover, it would also be able to leverage its position to gain a competitive advantage in downstream markets. Finally, the market power that could be exercised by the combined entity is unlikely to be transitory or offset by rapid entry or expansion of competition.

Thus, the Commission should condition its approval of the merger on an effective divestiture of an economically meaningful portion of the combined entity's Internet backbone operations. However, for such a divestiture to be meaningful, two conditions must be met. *First*, the Commission must ensure that the divested entity possess the resources necessary to operate as an effective, stand-alone entity. *Second*, the Commission should not permit the divested entity to be acquired by a significant existing Internet backbone provider such that the resulting entity could also exhibit anti-competitive characteristics.

Argument

I. THE PROPOSED MCI/SPRINT MERGER WOULD RESULT IN UNACCEPTABLE CONCENTRATION IN THE INTERNET BACKBONE MARKET.

There is little question that the proposed MCI/Sprint merger would significantly increase concentration in the Internet backbone market, one that already exhibits a high degree of concentration. By any traditional measure, the merger would increase that concentration to dangerous levels. Moreover, given the economics of the Internet backbone market, the increase in concentration would have significant, undesirable consequences both in the Internet backbone market and in downstream markets.

A. The Proposed Merger of Itself Would Lead to Unacceptably High Levels of Concentration in the Internet Backbone Market.

The Internet backbone market is already highly concentrated, as measured by the four-firm Herfindahl-Hirschman Index ("HHI"), as described in the merger guidelines promulgated by the Department of Justice and Federal Trade Commission.[2] Based upon estimates contained in the EC decision on the MCI/WorldCom merger,[3] Global Crossing estimates the HHI in the Internet backbone market at 2889.[4] The effect of the proposed merger would be to raise the HHI to 4438, or an increase of 1549 points.[5]

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2 United States Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (April 8, 1997) ("Merger Guidelines").

3 *Case IV/M.1069 - WorldCom/MCI*, Commission Decision (EC July 8, 1998) ("EC Decision").

4 This assumes market shares as follows: MCI/UUNet - 50%; Sprint - 15%; GTE/BBN - 10%; Fourth Firm- 8%.

See EC Decision, ¶¶ 110-12. These figures assume that post-divestiture MCI's market share has not slipped and that Sprint's market share is roughly the same as pre-divestiture MCI's market share. The estimated shares of GTE and the fourth firm are inferred from the EC analysis.

5 This assumes the resulting four-firm market shares at: MCI/Spring - 65%, GTE/BBN - 10%, Third Firm- 8%; Fourth Firm - 7%.

Under the Merger Guidelines, the post-merger market would be considered highly concentrated (as for that matter, would be the pre-merger market).[6] The increase in the HHI is presumed to be anti-competitive. As is explained in the Merger Guidelines:

> When the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of greater than 100 points are likely to create or enhance market power.[7]

Nor are there any countervailing trends that would suggest that this dominant position would be transitory or subject to repaid erosion through new entry or expansion of existing capacity. UUNet itself is growing at an explosive rate with demand doubling every 100 days.[8] While worldwide demand for Internet transport is also explosive, UUNet is certainly keeping pace. While new entrants -- like Global Crossing -- are themselves acquiring new Internet backbone business, this does not suggest that UUNet is losing ground.

The prior merger of MCI and WorldCom itself raised concerns significant enough that the European Commission conditioned its approval of the merger on the meaningful divestiture of MCI's Internet backbone business.[9] The EC concluded that the then-proposed MCI/WorldCom merger, if unaltered, "would lead to the creation of a dominant

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6 Merger Guidelines, § 1.51(c).

What is important to realize is that the actual numbers are not of themselves as important as the orders of magnitude that they represent. While the numbers used in the calculations are inferred, they are relatively insensitive to small changes, particularly in the third firm and fourth firm numbers. What is clear is that the Internet backbone market is highly concentrated and that the proposed merger would significantly exacerbate the consequences of that concentration.

7 *Id.*

8 *See* Testimony of Mike Mctighe, Chief Executive Officer, Cable & Wireless Global Operations before the Senate Commerce Committee Hearings on Telecommunications Mergers, Prepared Testimony at 10 (Nov. 8, 1999) ("Mctighe Testimony").

9 *See* EC Decision, § VII.

position in the market for the provision of top level or universal Internet connectivity."[10] In order to address these competitive concerns, MCI and WorldCom entered into the "Undertakings" that required MCI to divest its Internet business.[11]

In granting its approval of that merger, the United States Department of Justice relied upon the Undertakings. In announcing the merger clearance, Assistant Attorney General Joel Klein highlighted the benefits of the divestiture:

> The divestiture benefits anyone who relies on the Internet because it preserves competition among major Internet service providers.[12]

This Commission also relied upon the Undertakings in granting its approval of the MCI/WorldCom merger:

> We find, after independently reviewing all relevant provisions of the proposed divestiture agreement, that it will result in a full and complete divestiture of MCI's Internet business. Moreover, we conclude that this divestiture agreement eliminates the potential for anticompetitive harms that would have resulted from the merger in the provision of Internet backbone services.[13]

The same concerns that led the EC to condition its approval of the MCI/WorldCom merger on the divestiture of MCI's Internet business exist with respect to the MCI/Sprint merger. In 1998, the EC identified MCI, WorldCom, Sprint and GTE and the "big four" Internet backbone providers. Even after the divestiture of the MCI Internet business, the "big three" Internet backbone providers would be MCI, Sprint and

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10 *See* EC Decision, ¶ 135.

11 *Id., § VII.*

12 *See* McTighe Testimony at 8.

13 *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Dkt. 97-211, Memorandum Opinion and Order, FCC 98-221, ¶ 156 (Sept. 14, 1998).

GTE. Post-proposed-merger, the "big two" would be MCI and GTE with the combined MCI/Sprint entity controlling approximately sixty-five percent of the market.[14]

Under traditional antitrust analysis, the proposed MCI/Sprint merger raises competitive concerns that are sufficient to trigger appropriate remedial responses.

B. The Economics of the Internet Backbone Business Strongly Suggest That the Combined Entity Could Exercise Undue Market Power Both in the Internet Backbone Business and in Downstream Markets.

One of the unique features of the Internet backbone business is the existence of peering arrangements. Firms that enter into pure peering arrangements exchange traffic on essentially a bill-and-keep basis. For such an arrangement to make economic sense, net traffic flows of the peering parties must be in a reasonable balance. In addition, the nature of network competition makes it advantageous for customers (*i.e.*, downstream ISPs) to have access to the largest network. Possession of the largest network, by far, would provide the combined entity the ability and the incentive to discriminate against competing network providers and to leverage that dominant position into downstream markets.

1. The Combined Entity Would Have the Ability Unfairly to Discriminate Against Competing Network Providers.

As noted above, one of the unique features of the Internet transport business is the existence of peering arrangements, whereby competing network owners exchange traffic free of charge. Peering arrangements are valuable in that they permit end users and content providers to reach each other at relatively minimal costs, or without exporting network externalities upon third parties.

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[14] *See supra* at 3-4 nn.4-5.

Yet, peering arrangements only make economic sense if traffic is acceptably in balance. In these circumstances, peering benefits both network providers by permitting users to reach ISPs served by the other network provider seamlessly and without cost. The Commission need only look to the current debate surrounding reciprocal compensation -- in the context of section 251 of the Act -- to confirm this observation.[15]

The same is true with respect to the Internet. Typically, Internet backbone providers require a 2:1 traffic ratio in order to consider a peering arrangement with a competing network provider. Sprint, for example, has rejected a proposed peering arrangement with Global Crossing because of a traffic exchange ratio that would have exceeded 2:1.

The combination of MCI's and Sprint's Internet backbone businesses would provide a significant disincentive for the combined entity to enter into peering arrangements with competing network providers. The alternative to entering into peering arrangements is that the dominant network provider could exact transport fees from competing network providers on a net basis. As the EC concluded in connection with the then-proposed MCI/WorldCom merger:

> [t]he combination of Internet backbone networks of WorldCom and MCI would create a network of such absolute and relative size that the combined entity could behave to an appreciable extent independently of its competitors and customers.[16]

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15 *See e.g., Inter-Carrier Compensation for ISP-Bound Traffic,* CC Dkt. 99-68, Notice of Proposed Rulemaking, 14 FCC Rcd. 3689 (1999).

16 EC Decision, ¶ 117.

One result would be that such an entity could disadvantage its customers by "obligat[ing] them to pay for access to its network."[17] While it would nominally pay access to other network providers, the net flow of transport would be to the dominant network provider.

Such a result would have several undesirable consequences. It would, obviously, increase the costs of doing business of competing network providers. Moreover, because it is of obvious importance for retail ISPs to have access to their customers, competing network providers would have no choice but to accede to such arrangements. This would permit the dominant network provider to exact both ingress and egress fees, the former from its own retail customers and the latter from competing networks. In short, the dominant network provider would be in a position that its rivals could not match. The potential for anti-competitive conduct and commensurate consumer welfare harms are more than significant enough to condition approval of the proposed merger upon the adoption of appropriate safeguards.

2. The Proposed Merger Would Have Significant Downstream Anti-Competitive Effects.

Retail ISPs obviously need to reach the largest potential audience. In the first instance, the easiest way to do this is to have access to the largest network. Yet, the second-order effects are equally significant. The dominant network provider, by exacting transit fees from competing network providers, could raise the costs of retail ISPs that choose to do business with a competing network provider. Alternatively, by refusing to do business with a competing network provider, the dominant network

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[17] *Id.*, ¶ 123.

provider would disadvantage retail ISPs from utilizing competing network providers by preventing end users from reaching their destination points.[18] As the EC concluded:

> [b]ecause of the specific features of network competition and the existence of network externalities which make it valuable for customers to have access to the largest network, MCI WorldCom's position can hardly be challenged once it has a dominant position.[19]

A result of this dominant position is that the EC rightfully feared was the ability of the combined entity to "leverage its position to gain a dominant position downstream."[20]

These concerns are equally applicable to the proposed MCI/Sprint merger.

II. THE COMMISSION SHOULD CONDITION ITS APPROVAL OF THE PROPOSED MERGER ON THE IMPOSITION OF MEANINGFUL DIVESTITURE CONDITIONS.

As described in Part I above, the proposed MCI/Sprint merger creates an unacceptable risk of anti-competitive behavior and effects. In this regard, this proposed merger is no different from the MCI/WorldCom merger as originally proposed. Meaningful divestiture was the remedy adopted in that case, although it is far from clear that the divestiture that was actually accomplished was truly meaningful.

When given the opportunity, the Commission should ensure that any divestiture is truly meaningful. There is no question that the Commission may condition its approval of the proposed merger on appropriate conditions.[21] Moreover, the

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18 In the absence of a truly dominant network provider, such a strategy would make no economic sense as the recalcitrant network provider would itself be sacrificing revenue and customer goodwill for no apparent gain.

19 EC Decision, ¶ 126.

20 *Id.*, ¶ 124.

21 The Commission has approved previous mergers based upon the acceptance of competition-enhancing conditions. *See, e.g., Applications of Ameritech Corp., Transferor, and SBC Communications Corp., Transferee, for Consent to Transfer of Control,* CC Dkt. 98-141, Memorandum Opinion and Order, 14 FCC Rcd. 14717, ¶¶ 348-518 (1999) ("SBC/Ameritech Order"). Moreover, in the wireless context, the Commission

Commission must ensure that any divestiture is truly meaningful, *i.e.*, the divested business entity will be able to operate effectively as a stand-alone entity. Finally, the Commission should make clear that the combined divested and acquiring entity are not able to replicate the anti-competitive concerns manifested by the proposed merger.

A. The Commission Should Ensure that Any Divestiture Is Truly Meaningful.

Particularly given the degree of concentration in the Internet backbone business, any divestiture must be truly meaningful or the exercise will have been futile. That means at a minimum that the divested entity must be able to act as an effective, stand-alone competitor. This, in turn, means that such entity must be divested with sufficient assets, personnel and other resources to allow it to compete against its former owner. The Undertakings provide a useful starting point. These required MCI and WorldCom:

- to transfer employees necessary to support the Internet business being transferred;
- to transfer all contracts with wholesale and retail Internet access customers;
- to supply necessary support arrangements at favorable rates; and
- to refrain from soliciting or contracting to provide dedicated Internet access services to the divested entity's customers.[22]

The EC found such conditions necessary to ensure that the divested entity was able to compete effectively.

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has conditioned its approval of mergers among cellular entities upon the divestiture of overlapping properties. *See e.g.*, *Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Company,* File No. 00762-CL-AL-95, Memorandum Opinion and Order, 12 FCC Rcd. 22280 (1997).

22 EC Decision, § VII.

Such conditions, however, form only the starting point. If those conditions are not honored, then the exercise may well become meaningless. Cable & Wireless -- the successor to MCI's Internet business -- has commenced litigation alleging that MCI/WorldCom has materially violated the Undertakings. Global Crossing is not a party to that dispute and does not express any opinion on the merits of the proceeding. Nonetheless, the existence of this dispute is instructive. The relevant enforcement authorities -- including this Commission -- should adopt appropriate penalties to ensure against "backsliding." In approving Bell Atlantic's section 271 application for New York[23] and the SBC/Ameritech merger,[24] the Commission acknowledged the efficacy of such a set of conditions. The Commission should adopt the same approach here.

B. The Commission Should Decline to Approve Any Divestiture of Internet Backbone Assets to Another Major Internet Backbone Provider.

In its review of the MCI/WorldCom merger, the EC identified the "big four" Internet backbone providers. Although MCI/UUNet was by far the largest, the relative presence of the next largest providers was not insubstantial. Any combination of divested assets with one of the next set of largest providers would risk anti-competitive consequences similar to those that approval of the proposed merger without adequate conditions would entail.

The major differences would be that, instead of one dominant provider, there would be two. The anti-competitive consequences would not, however, be all that

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23 *Application of New York Telephone Company (d/b/a Bell Atlantic – New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company and Bell Atlantic Global Networks, Inc. for Authorization To Provide In-Region, InterLATA Services in New York,* CC Dkt. 99-235, Memorandum Opinion and Order, FCC 99-404, ¶¶ 429-43 (Dec. 22, 1999).

24 SBC/Ameritech Order, ¶¶ 406-18.

dissimilar. Based upon the market shares assumed above,[25] the resulting HHIs would still exhibit a remarkably high degree of concentration. The resulting HHIs would range from approximately 3100 to 3300. That would still result in a post-merger environment that the Merger Guidelines would presume to be anti-competitive.

In addition, such a post-divestiture environment would exhibit essentially the same characteristics as one that would follow the proposed merger without a divestiture condition. The two largest firms might have an incentive, for example, to peer with each other, but would have no incentives to peer with other Internet backbone providers. The result would be essentially comparable in the Internet backbone market and could potentially have the same downstream effects identified in Part I above.

Accordingly, the Commission -- as a part of its approval of the proposed merger -- should not approve any proposed divestiture plan under which any of the surviving largest Internet companies acquire the Internet assets that would be subject to any divestiture condition.

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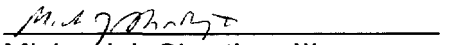
[25] *See supra* at 3-4 nn.4-5.

Conclusion

For the foregoing reasons, the Commission should act upon the Joint Application in the manner suggested herein.

Respectfully submitted,



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February 17, 2000

Certificate of Service

I hereby certify that, on this 17th day of February, 2000, copies of the foregoing Comments of Global Crossing Telecommunications, Inc. were served by first-class mail, postage prepaid, upon:

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